Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1490

S & H PACKING CO., INC., a California corporation,

Petitioner,

vs.

CESAR DE SARACHO and FERNANDO DE SARACHO, dba SARACHO HNOS.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Dated: May 27, 1975.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on March 21, 1975.

Citations to Opinions Below.

No opinion was filed by the District Court and the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is printed in the Appendix hereto and has not been published. A timely Petition for Rehearing was denied by the United States Court of Appeals for the Ninth Circuit on April 21, 1975.

Jurisdiction.

The jurisdiction of the United States District Court arose under the provisions of 28 USC 1332; the jurisdiction of the United States Court of Appeals for the

Ninth Circuit was in accordance with 28 USC 1291 and the jurisdiction of this Court is set forth in 28 USC 1254(1).

Questions Presented.

1. Whether it is a denial of due process of law under the Fourteenth Amendment to the federal constitution to refuse to enforce a modification of written agreements by executed oral agreement upon the payment of a valid consideration in a situation where there is no conflict in the evidence concerning the execution of the modification of the written agreements or the support thereof by a valid consideration under state law.

2. Whether there has been a denial of due process of law to a litigant by entering a judgment against it for an amount of money which is, in effect, owed to it by the judgment creditor in the face of uncontradicted evidence that the written agreements relied upon by the lower court were, in fact, modified, which modification was supported by a consideration.

There Is No Statute Involved.

There is no Arizona statute involved, but the due process provision of the Fourteenth Amendment to the United States Constitution is of importance to the resolution of the legal problem here presented.

Statement of the Case.

The facts in this case are simple, uncontested and shocking:

Respondents, Mexican nationals, filed an action in the United States District Court for the District of Arizona against Petitioner, a California corporation duly licensed to transact business in the State of Arizona,

arising out of certain written agreements entered into between the parties wherein and whereby the parties dissolved and terminated a partnership which involved the growing of tomatoes and other agricultural crops in Mexico. Respondents' complaint was in four causes of action but the evidence at the time of trial was limited to only one cause of action.

Petitioner set up as a special defense for declaratory relief the execution of an oral agreement wherein and whereby the basic written agreements of the parties were modified and a declaration of the rights, duties and obligations of the parties was sought. The learned District Judge entered judgment against Petitioner for $267,199.42, despite the fact that the record without contradiction established that Respondents owed Petitioner $180,000.00, evidenced by three promissory notes providing for interest and attorney's fees, which were then and there owing but not yet due. The District Court flew in the face of uncontradicted evidence that the written agreements had been modified by the payment of new consideration of $125,000.00 in cash and the prepayment of over $400,000.00 in crop proceeds prior to the date the same would have been due except for the oral modification of the written agreements.

A little further detail is necessary to fully understand the factual situation with which we are dealing. On December 31, 1970 Petitioner and Respondents entered into a written agreement whereby Petitioner agreed to sell its partnership interest to Respondents in a Mexican tomato growing enterprise for the sum of $303,000.00, payment therefor to be represented by a series of promissory notes bearing interest at the rate of 4% per annum, most of which notes became due and payable in $60,000.00 annual installments be-

tween March 31, 1971 and December 31, 1975. Said agreement was amended by written document executed by the parties on January 15, 1971. At or about the same time said written agreements were entered into the parties entered into an oral agreement wherein and whereby Petitioner was to continue to handle the 1970-1971 tomato crop to be grown by Respondents in Mexico. Respondents were to ship their tomatoes to Petitioner as a commissioned agent and Petitioner agreed to advance the necessary funds to finance the growing, harvesting, transportation and other expenses in connection with said crop and would sell said tomatoes and remit the proceeds to Respondents at the end of the growing season and give an accounting at that time, which was estimated to be on or about June 1, 1971. Petitioner was to receive a 10% commission on the total dollar volume of the gross sales and would recoup out of the sale of the crop its advances, for which it would reimburse itself out of the first monies received. The total gross sales for said crop during said season were close to $3,000,000 and the net proceeds of said sales were close to $2,000,000. The advances made by Petitioner during said period amounted to almost $1,400,000.

In March of 1971 Respondents made what appeared to Petitioner to be unreasonable financial demands and desired an accounting prior to the end of the growing season. Respondents also demanded further cash advances unrelated to the growing of the crop which Petitioner refused to make. On or about March 31, 1971 Petitioner, acting through its president, Robert L. Horwath, met with Respondents in Nogales, Arizona, at which time Respondents demanded large sums of cash and actually had stopped the shipment of tomatoes

at the border. Mr. Horwath informed Respondents that he would advance them $125,000.00 in cash at that time which they would be required to repay at the rate of $25,000.00 per week out of the proceeds of the sale of the tomatoes during the next five weeks. He further stated that instead of holding all of the funds resulting from the sale of the tomatoes until June 1 he would advance the monies as they came in, provided that Respondents would agree to pay the entire balance due under the December 31, 1970 written agreement during the current growing season and that the notes which were to mature between December of 1971 and December 1975 would be paid in full by the end of the growing season. There is no question but that Respondents refused this offer, left the meeting and went their way. The District Court's finding thus far is correct. Petitioner thereupon directed its employees to close its packing shed in Nogales, Arizona and to cancel all of its orders and to leave Nogales. Mr. Horwath returned to his home in Los Angeles. The District Court failed to find on the uncontradicted record that the following morning one of the Respondents came to the packing shed and said, "We want the $125,000.00. When can we get it?" Contemporaneously therewith the tomato trucks again commenced rolling to the Nogales packing shed. A call was made to Mr. Horwath in Los Angeles who arranged to have the checks issued which were delivered that very day. The repayment of the $125,000.00 advance was made in the manner set forth above. In addition to that, between April 4 and the end of May $400,000.00 was paid to Respondents in accordance with the offer made by Mr. Howarth. Based upon this hornbook factual situation the trial court did not make a finding of an executed oral agree-

ment. Obviously, there was a full and complete acceptance of the offer, compliance therewith and the acceptance of adequate consideration by Respondents. This is almost like the classic law school example of offer and acceptance where A lives across the river from B and A tells B that he wants to accept his offer to light a fire at 8:00 o'clock that night. B lights the fire, but it is a foggy evening and A can't see the fire. The acceptance of the offer was made in accordance with the terms set by the offeror and there is, of course, a binding agreement. In the case at bar the Court became confused apparently because Respondents walked out of the meeting when the offer was first made, but everyone has forgotten that the offer was accepted in the most obvious manner the next day by asking for the $125,000.00 advance and resuming the shipment of tomatoes which had ceased the previous day.

It is Petitioner's position that the foregoing factual situation is without contradiction and that it is also uncontradicted that the Respondents' notes, each in the sum of $60,000.00, carrying interest and attorney's fees, due December 31, 1973, December 31, 1974 and December 31, 1975, have not been paid and that Petitioner is the owner and holder thereof. It is also obvious and clear that if this money of Petitioner's is collected in Arizona and taken into Mexico a grave injustice will occur to Petitioner and Petitioner will be deprived of its funds as the result of a miscarriage of justice.

REASONS FOR GRANTING THE WRIT.

I.

A Grave Miscarriage of Justice Results From Respondents Obtaining a Judgment for $180,000.00 With Interest on Money Due and Owing by Respondents to Petitioner.

The trial court rejected a finding of executed oral agreement which the Court of Appeals affirmed by stating, "The evidence presented by the parties was conflicting." There was no conflict in the evidence of any kind. When the offer to advance the additional $125,000.00 was made and the further offer to expedite the payment of crop proceeds was made, there is no question but that Respondents refused the offer, stopped the shipments and Petitioner prepared to shut down its Nogales operation. Nobody questions that the very next day one of the brothers Saracho appeared to pick up the $125,000.00, that the tomato trucks started moving to the shed again and that over $400,000.00 was paid prior to June 1, 1971 on sales made by Petitioner. The only conflict that arose was after they got the money and then sought legal advice to enable them to contest the facts as they actually occurred. The trial court confused the facts as they existed at the time the transaction occurred and the way Respondents wanted to make the facts appear when they got into the courtroom.

II.

Arizona Law Re Executed Oral Agreements.

Arizona law uniformly recognizes that a written agreement may be modified by a subsequent oral agreement.

American Eagle Fire Ins. Co. v. McKinnon, (1930) 36 Ariz. 409, 286 Pac. 183;

In re Estate of MacDonald, (1966) 4 Ariz. App. 94 at 97, 416 P. 2d 782.

That jurisdiction also requires that there must be a consideration to support the oral modification of a written agreement.

Pleasant v. Arizona Storage Co., (1928) 34 Ariz. 68 at 76, 267 Pac. 794.

It is our position that all of the requirements of Arizona law were met under the facts of this case. One of the Respondents testified and very clearly indicated that Respondents knew exactly what they were doing when they agreed to take the $125,000.00 and have their payments accelerated. The Respondent, Fernando De Saracho, testified that he was told by Mr. Horwath that unless Petitioner could collect all of the money during that year there would be no further monies paid by way of advances. Respondent stated that he understood that was the situation and with that understanding in mind he and his brother took the $125,000.00 as well as the additional $400,000.00 in accelerated payments.

III.
Finding of District Court Not Saved by Rule 52(a) F.R.C.P.

It is the uniform rule of federal law that where there is no substantial evidence to support the findings of fact made by a court it is the duty of the appellate court to determine that such findings are clearly erroneous within the meaning of the rule.

James Julian, Inc. v. Town of Elkton, 341 F. 2d (CA 4, 1965);

Federal Security Insurance Co. v. Smith, 259 F. 2d 294 (CA 10, 1958);

Miller v. C. I. R., 203 F.2d 350 (CA 6, 1953).

IV.

The Court of Appeals Erred in Not Ordering Judgment Reduced.

Since the entry of the trial court's findings of fact two $60,000.00 notes payable by Respondents to Petitioner, together with interest and attorney's fees, became due and payable. The final note will become due and payable on December 31, 1975. It seems that there would be a multiplicity of legal proceedings resulting from the affirmance of such a judgment and that the practical solution to this problem would have been for the appellate court to have ordered the trial court to credit the accruals against the judgment, even if the appellate court believed that there had been no executed oral agreement, as it would be, in effect, a taking of Petitioner's property without due process of law if Respondents can come in and collect the entire amount of the judgment when, in fact, Respondents owe Petitioner a substantial amount of said judgment.

Conclusion.

While this might be only a simple diversity case, it is our view that a miscarriage of justice has occurred and that no court but this Court can correct that miscarriage of justice. If the purpose of our legal system is to bring about the dispensation of justice between man and man, then that system has miserably failed if one litigant can walk away after collecting $267,000.00 from another litigant when it is specifically and notori-

ously admitted that the litigant collecting the money owes the other $180,000.00, plus interest and attorney's fees. Such a result is, in effect, a travesty on justice and there must be some court in the land that can correct judicial error resulting in such a miscarriage of justice.

It is respectfully submitted that for the foregoing reasons this Petition for Writ of Certiorari should be granted.

Dated: May 27, 1975.

Respectfully submitted,

BERTRAM H. ROSS,
Counsel for Petitioner.

APPENDIX.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Cesar De Saracho and Fernando De Saracho, dba Saracho Hnos, Plaintiff-Appellees, vs. S & H Packing Co., Inc., Defendant-Appellant. No. 73-3217.

Appeal from the United States District Court for the District of Arizona.

Before: CARTER and WRIGHT, Circuit Judges, and EAST, Senior District Judge.*

This is a diversity action brought by the appellees, citizens of Mexico, against the appellant, a California corporation doing business in Arizona. The litigation involves alleged written and oral contractual rights and duties among the parties in a tomato raising venture in Mexico with an interlinking marketing enterprise in the United States.

The appellant appeals from a judgment in favor of the appellees following an extensive evidentiary trial by the court. We affirm.

Two of appellant's assignments of error deserving of discussion are:

A. The District Court's finding and conclusion that the December 31, 1970 written agreement was not modified by an executed oral agreement accompanied by the payment of $125,000 to appellees was not supported by the evidence.

B. The District Court as a matter of law erroneously gave judgment against appellant for $180,000 of appellant's own money.

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The appellant also asserts three additional assignments of error, two of which deal with evidentiary rulings and the third with an item of private indebtedness of one of the appellee's partners. We concluded from our examination of the record that each of those three additional assignments of error is wholly without merit.

Assignment of Error A:

The appellant in its assertion of an executed oral modification of the written agreement carried the burden of proving these two elements: First, a mutual intention on the part of the parties to modify the contract. *Yeazell v. Copins,* 98 Ariz. 109, 116, 402 P.2d 541, 545 (1965). Second, that any such intended modification was supported by additional consideration. *Pleasant v. Arizona Storage & Distributing Co.,* 34 Ariz. 68, 76, 267 P. 794, 797 (1928).

The evidence presented by the parties was conflicting. The District Court had the advantage of seeing and hearing the witnesses in person and had full opportunity to judge their credibility. The District Court's findings of fact are definite and explicit in finding adversely to all of the appellant's contentions of fact. We conclude from the record that the District Court's findings of fact rejecting the contention of an oral modification of the written contract are amply supported by relevant evidence, and we are not convinced that they are clearly erroneous. Fed. R. Civ. P. 52(a); *Sessions, Inc. v. Morton,* 491 F.2d 854, 858 (9th Cir. 1974).

Assignment of Error B:

When the District Court found that there was no mutually agreed modification of the December 31, 1970 written agreement, *a fortiori,* the appellant's claim of right under the modification to accelerate the payment date of the appellees' then unaccrued installment payments under the written contract collapsed, and the appellant's unilateral withholding of the sum of $180,000 then due appellees on the accounting for crop profits was a tortious conversion. The District Court applied the correct measure of damage for that conversion. *Markel v. Transamerica Title Insurance Company,* 103 Ariz. 353, 442 P.2d 97, 104 (1968); *Phelps v. Melton,* 14 Ariz. App. 296, 297, 482 P.2d 905, 906 (1971); and *Higgins v. Arizona Savings and Loan Association,* 90 Ariz. 55, 63, 365 P.2d 476, 482 (1961).

The judgment of the District Court dated and filed on September 17, 1973 is affirmed.

AFFIRMED.